IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 15.05.2007

CORAM:

THE HONOURABLE MR. JUSTICE K.MOHAN RAM

Second Appeal No.949 of 1994

1.S.Govindasamy (died)
2.G.Padmavathi
3.G.Banumathi
4.G.Saraswathy Priya
5.G.Gopinath
(Appellants 2 to 5 are brought on record as LRs of the Deceased-Sole Appellant vide order of the Court dated 07.08.2001 made in C.M.P.Nos.15704 to 15706 of 1998) .. Appellants/Defendants

-Vs-

Gowthiya Sangam, Nagore,
Rep. By its Secretary, M.A.A.Sathakathullah,
No.50 Pudumanai Street, Nagore. .. Respondent/Plaintiff

APPEAL filed under Section 100 of Code of Civil Procedure against the judgment and decree dated 28.06.1994 made in A.S.No.305 of 1992, on the file of the Sub-Court, Nagapattinam, reversing the judgment and decree dated 27.02.1991 made in O.S.No.187 of 1987, on the file of the District Munsif at Nagapattinam.

For Appellants : Mr. Srinath Sridevan, for Mr. R.Ramesh.
For Respondent : Mr. T.P.Sankaran.

J U D G M E N T

The above second appeal is preferred by the defendant in the suit who is a tenant under the plaintiff. The suit is for recovery of possession. The plaintiff is a society represented by its Secretary. The plaintiff claimed that it is a Muslim Religious Charitable Trust, whereas the defendant contended that the plaintiff is a Society and it is not established by the plaintiff that it is a Muslim Religious Charitable Trust, hence the suit is not maintainable in the Civil Court inasmuch as the defendant is entitled to the benefits of the Tamil Nadu Buildings (Lease and Rent Control) Act, and according to the defendant, the remedy of the plaintiff, if any, should be only by taking appropriate proceedings

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under the Rent Control Act. The defendant further contended that the Notice to Quit was not in consonance with the provisions of Section 106 of the Transfer of Property Act. That contention of the defendant was sought to be met by the plaintiff by invoking the provisions of G.O.Ms.No.2000 Home dated 16.08.1976 exempting all buildings owned by a Hindu, Christian or Muslim Religious Public Trusts and Public Charitable Trusts from all the provisions of the said Act. The contentions of the defendant were accepted by the Trial Court, but the Lower Appellate Court rejected the same and held that the Notice to Quit is valid and the suit is maintainable and reversed the judgment of the Trial Court.

2. At the time of admission of the second appeal, the following substantial questions of law have been framed:-

> "1. Whether the burden of proof as to competency to institute a suit does not lie on the person claiming to have such competency?
> 2. Whether a society registered under the Societies Registration Act (1860) can be a Religious Public Trust or a Public Charitable Trust as defined in G.O.Ms.No.2000, Home dated 16.08.1976?
> 3. Whether the word "Trust" is used in G.O.Ms.No.2000 Home dated 16.08.1976, does not refer to trusts created as per the provisions of the Indian Trusts Act (1882)?
> 4. Whether a Registered Society, which is not created either by a Registered Trust Deed, or by a Testamentary Instrument creating a Trust, can institute a suit to evict a tenant from premises to which the Tamil Nadu Buildings (Lease and Rent Control) Act applies?"

3. Heard Mr.Srinath Sridevan learned counsel for the appellants and Mr.T.P.Sankaran learned counsel for the respondent.

4. Though the above said substantial questions of law have been formulated, the learned counsel for the appellants confined his submissions only in respect of Substantial Questions of law 2 and 4. He fairly submitted that the contention as to Notice to Quit will not survive in view of the Transfer of Property (Amendment) Act 2002, which applies to pending cases. The learned counsel further submitted that the respondent does not fall under the purview of the G.O.Ms.No.2000, which was is in super-cession of the earlier G.O.Ms.No.1998. Under G.O.Ms.No.2000 all Public Religious and Charitable Trusts' would not fall under the purview of the Tamil Nadu Buildings (Lease and Rent Control) Act 1960 and would be exempted from its provisions, significantly the G.O.Ms.No.1998 exempted "all religious trusts and charitable institutions" from the purview of the Tamil Nadu Buildings (Lease and Rent Control) Act 1960. The G.O.Ms.No.2000 then superceded the previous order and allowed only public religious and charitable trusts to be exempted from the purview of the Act. The learned counsel relied upon Section 3 of the Indian Trusts Act, 1882, which reads as follows:-

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> "A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner".

and submitted that there are four main ingredients which constitute a trust, they are as follows:-

1.Author of trust
2.Beneficiary
3.Trust Property
4.Legally enforceable obligation annexed to ownership.

5. The learned counsel for the appellants submitted that though the Indian Trusts Act 1882 is not applicable to Public Trusts, since no definition is given elsewhere as to what is a trust, the definition given under the Indian Trusts Act 1882 can be used in order to understand the meaning of a trust. According to the learned counsel, the respondent is not a trust as described under Section 3 of the Indian Trusts Act for the following reasons:-

(i)The respondent is a society, no doubt having the purpose of the benefit of the Muslims in Nagore. However, not every Muslim can become a member of the society. For a person to become a member of the trust, he must be a respectable person with social standing, more than 18 years and must give an application along with the membership fee and the committee of the society will then decide whether such person can become a member of the society. Only then a person can become a member vide bye-law II of Ex.A-3. While in case of a religious or public trust, every member of that religion or the general public, is a beneficiary of the trust.

(ii)Secondly, for an institution to be a "trust" there must be a legally enforceable obligation annexed to the ownership of the property and not merely a moral obligation. Here there is no such obligation annexed to the property held by the respondent. In a society, the obligation is not annexed to the property but to the office bearers. By way of example, if the respondent was a trust, any Muslim of Nagore could institute a suit to enforce the obligations of the Trustees. However, no such suit would lie, in the case of a society, since Section 92 of the Code of Civil Procedure has no application thereto. Only a member of the society can institute a suit against the society, to compel performance of its objects, and not any Muslim of Nagore, as in the case of a trust.

6. The learned counsel for the appellants relied upon the following decisions:-

(i)2001 (2) Law Weekly 736 (Vijayakumar Vs. Roman Catholic Church)
(ii)2004 (3) M.L.J. 682 (Natarajan Vs. Saliyur Mahajana Sangam, Mayiladuthurai)

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(iii)2006 (2) M.L.J. 528 (Rajamanickam K. (died) Vs. Periyar Self-respect Propaganda Institution, Trichirapalli)
(iv)A.I.R. 2005 Kerala 233 (Abhaya, A. Society Vs. J.A.Raheem)
(v)100 Law Weekly 182 (Guhan, etc. S. Vs. Rukmini Devi Arundale, etc.)

7. Per contra, the learned counsel for the respondents submitted that the legal principles laid down in the decisions referred to by the learned counsel for the appellants cannot be applied in abstract to this case, but only after looking into the facts of this case, it can be applied if the fact situations of the cases are similar. Learned counsel submitted that though the plaintiff claimed exemption under G.O.Ms.No.2000 in the plaint as a Public Religious Trust, the said claim has not been categorically denied by the defendant in the written statement, since the Trial Court did not consider the provisions contained in Ex.A-3-bye-laws of the plaintiff society and the evidence available on record and recorded an erroneous finding, the same was set-aside by the Lower Appellate Court. According to the learned counsel, the Lower Appellate Court has elaborately considered the objects and purposes of the plaintiff society as contained in the Rules and Regulations in Ex.A-3 and the evidence on record and has recorded a clear finding that it is a Public Religious Trust. As the finding of the Lower Appellate Court is based on evidence, the same cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure. The learned counsel further submitted that the Indian Trusts Act deals with Private Trusts only and it is not applicable to Public Trusts and has submitted that as per Section 1 of the Indian Trusts Act, that Act does not apply to Public Trusts and Public Charitable Trusts and it has been so held by the decisions reported in A.I.R. 1994 Madras 363 (D.Balasubramanian Vs. R.Ramaswamy Naidu), A.I.R. 1982 Delhi 453 (Shanti Devi Vs. State) and A.I.R. 1972 Delhi 128 (C.C.R.Authority Vs. Banarsi Dass).

8. The learned counsel took me through various clauses of bye-laws contained in Ex.A-3 to show the objects and purposes of the society and the nature of charities that has to be performed by the plaintiff. The learned counsel pointed out that there is no pleading in the written statement to the effect that the plaintiff is not doing any public charity. Learned counsel submitted that the Trust contemplated in G.O.Ms.No.2000 does not relate to the Indian Trusts Act.

9. The learned counsel for the respondent further submitted that in the judgment dated 11.08.2005 rendered by Mr. Justice T.V.Masilamani in S.A.No.2 of 1994 which arouse out of a suit filed by the present plaintiff against another tenant in respect of the building owned by the plaintiff society, the Learned Judge has held that the plaintiff society is entitled for the exemption granted under G.O.Ms.No.2000 and the suit was held to be maintainable by holding that the plaintiff is a Public Religious Trust and therefore, submitted that a conflicting finding cannot be rendered in this second appeal.

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10. I have carefully considered the submissions made on either side and the materials on record.

11. The Lower Appellate Court while considering the point as to whether the plaintiff society is a 'public trust' or a 'private trust', after considering the various provisions contained in Ex.A-3 bye-laws of the society and particularly the objects of the society and the provisions contained at page 25 of the bye-laws, has recorded a categorical finding that the society has not been formed by a particular member for the benefit of a particular section of the society and it is not functioning for the benefit of the particular section of society, whereas it has been formed for the benefit of the entire Muslim public. The Lower Appellate Court has also observed that simply because the plaintiff society has been incorporated under the Act 21 of 1960 it cannot be described as a private society. The real character of the plaintiff society has to be determined only with reference to the objects of the society.

12. By applying the said principle, the lower appellate court on a careful consideration of the rules and regulations contained in Ex.A-3 has come to the conclusion that the plaintiff society has been incorporated for the benefit of the Muslim public and on that ground has recorded a finding that it is a public charitable trust. It has to be pointed out that in paragraph 1 of the plaint, the plaintiff has claimed that the plaintiff is an Islamic Public Charitable Trust and in paragraph 6 also the same averment has been reiterated. In the written statement filed by the first appellant in paragraph 1 it is stated that the suit is legally not maintainable. In paragraph 4 of the written statement it is stated that in the plaint it is not stated as to how the plaintiff has been called as charitable trust and the details of the Public Charities have not been stated and as such the claim of the plaintiff that the plaintiff is a Muslim Charitable Trust cannot be accepted and therefore, it should be considered only as a private trust. P.W.1 in his evidence has spoken to about the various charities that is being performed by the plaintiff society and the schools run by it, the free education provided to the children and the various other charitable activities performed by the society for the wellbeing of the Muslim Public of Nagore etc., but nothing has been elicited in his cross examination to disbelieve him. The defendant while examining himself as D.W.1 in his chief examination has stated as follows:-

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"தா.வா. சங்கம் தருமஸ்தாபனம் என்றால் எனக்கு தெரியாது. எனக்கு தெரிந்து தருமங்கள் ஏதும் செய்யவில்லை",

Except this statement D.W.1 has not stated anything in his chief examination regarding the character of the plaintiff society. Whereas in his cross examination D.W.1 has stated as follows:-

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"கௌத்தியா சங்கம் நாகூரின் முஸ்லீம்களின் வாழ்கையின் முன்னேற்றத்திற்காக ஏற்பட்ட சங்கம் என்று எனக்கு தெரியாது. வாதி சங்கத்தால் ஒரு பள்ளி நடத்தப்பட்டு வருகிறது என்று எனக்கு தெரியும் அந்த பள்ளியில் இலவச கல்வி வழங்கப்பட்டு வருகிறது என்பது எனக்கு தெரியாது. நுஒ,ஞ/2/ஐ பற்றி எனக்கு தெரியாது. சங்கத்தின் நோக்கங்களும் எனக்கு தெரியாது. வாதி அறக்கட்டளை தனிப்பட்ட அறக்கட்டளையா அல்லது பொது அறக்கட்டளையா என்பது பொருத்து தெரியாது,"

The above averments in the written statement and the evidence of D.W.1 makes it crystal clear that the defendant has not categorically stated that the plaintiff is not a Public Charitable Trust. A perusal of the answers elicited from D.W.1 in his cross examination shows that D.W.1 simply says that he is not aware of the performance of public charities by the plaintiff. He has also stated that he is not aware as to whether free education is provided in the school.

13. In the decision reported in 100 Law Weekly 182 (Guhan, etc. S. Vs. Rukmini Devi Arundale, etc.) a Division Bench of this Court in paragraph 53 has observed as follows:-

> ".... even in a suit filed under S.92 C.P.c., whether the properties included in the schedule to the plaint belong to the Trust or not would be a relevant aspect and when such a point is taken in the appeal, it has become obligatory on the part of the respondents to show to the Appellate Court that the properties belong to the trust, which is distinct and different from the society. For reasons already stated, they have miserably failed to place any iota of material to show that either the Trust had existed as claimed or that the properties did not belong to the Society as mentioned in the relevant sale deeds".

Thus for deciding the question as to whether the plaintiff is a society or a trust and whether it is a Public Religious and Charitable Trust, evidence should have been adduced by the plaintiff, though the plaintiff has adduced evidence by way of Ex.A-3-bye-laws and the evidence of P.w.1, the defendant to show the plaintiff society is not performing any public charities has not adduced any acceptable evidence. No independent witness has been examined and even the evidence of D.W.1 is not categorical in that respect. With the nature of pleading in the written statement and the nature of evidence adduced by D.W.1, it is not possible to accept the contention of the defendant that the plaintiff is not a public religious and charitable trust. When the Lower Appellate Court on a consideration of the materials available on record has recorded a finding in favour of the plaintiff, this Court is not inclined to interfere with such a factual finding. Further in respect of the same plaintiff society a finding has

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been recorded by a learned Judge of this Court in the judgment dated 11.08.2005 rendered in S.A.No.2 of 1994. While considering a similar question, the Learned Judge in paragraphs 16 and 17 has observed as follows:-

> "16. In this context, learned counsel for the respondent has adverted the attention of this Court to Ex.A-3, bye-laws of the Sangham and contended rightly that the same would disclose that the respondent is a public religious trust entitled to the exemption under the Government Order referred to above from the provisions under Tamil Nadu Act 18 of 1960. Hence, learned counsel for the respondent has argued in my opinion rightly that in view of the above circumstances, it is no longer open to the appellant to contend that the respondent is not entitled to the exemption from the provisions of the said Act.
>
> 17. For the reasons above mentioned, this Court is of the considered view that the learned Subordinate Judge has correctly appreciated the facts and evidence of the case to come to the right conclusion that the respondent Sangham is exempted from the provisions of Tamil Nadu Act 18 of 1960 as per G.O.Ms.No.2000 Home Department dated 16.08.1976 referred to above and that P.W.1 is the Secretary of the respondent Sangham who has got locus standi to maintain the suit."

Though as rightly contended by the learned counsel for the appellants that the principle of res judicata may not apply as the appellants were not a parties to the proceedings in which the said judgment has been rendered, yet the judgment rendered by this Court in a Second Appeal arising out of a suit for eviction instituted by this same plaintiff against another tenant of a property belonging to it is a binding precedent. The above view of mine is supported by a decision of this Court reported in 1996 T.L.N.J. 131 (K.M.Rathinam Nadar and Another Vs. Arulmigu Hanumantharayar Bhajanai Madam alias Hanumar Kovil Rep. By its Hereditary Trustee Tmt.L.Padmavathiammal). If a conflicting finding is rendered in this appeal, that will run counter to the findings rendered in Second Appeal No.2 of 1994 in respect of the same plaintiff.

14. In the above decision, His Lordship Mr. Justice M.Srinivasan (as He then was) after referring to number of judgments of this Court and various High Courts and the Apex Court has observed as follows:-

> "Learned counsel for the respondent has drawn my attention to the judgment of the Supreme Court in Madho Das Vs. Mukand Ram (AIR 1955 SC 481). That case related to construction of a will. The Supreme Court held that where a Privy Council had construed certain document viz., a will, though the decision is not binding on a person not a party to that litigation, yet the decision operates as a judicial precedent. It is argued by learned counsel that in the

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present case, the judgment of the High Court in K.Lakshmi Venkatarama Rao's case ((1972) II M.L.J.93) should be construed as a judicial precedent, even if it is not a judgment in rem. In support of this proposition, learned counsel refers also to Virupakshayya Shankarayya V. Neelakanta Shivacharya Pattadadevaru (1995 Supp. (2) SCC 531). The relevant portion of the judgment reads as follows:- (Omitted)

The above judgment of the Supreme Court places the matter beyond doubt. Even if the judgment of this Court in the prior proceedings cannot be treated as a judgment in rem, it can certainly be treated as a precedent inasmuch as it decides the character of a temple. It should be noticed that the question whether a temple is a private or a public one is essentially between the persons who claim it to be private temple and the Hindu Religious and Charitable Endowments Department. Once as between them the said question has been decided one way or other, that should be treated as a precedent in a subsequent case if the question arises between some third parties and one of the parties to the earlier proceeding.

In this case, I have already pointed out that there is ample evidence to support the finding of fact that it is a public temple and it cannot be also held that the judgment rendered by this Court in K.LAKSHMI VENKATRAMA RAO's case ((1972) II MLJ 93) is a binding precedent".

15. In view of my above reasoning, I do not consider it necessary to consider the other submissions made by the learned counsel for the respondent based on 'Trust' as contained in Section 3 of the Indian Trusts Act and the decisions relied upon by him in support of the said contentions.

16. In the above said circumstances, the substantial questions of law are answered in favour of the respondent and this Court is of the considered view that there is no merit in the appeal and the same is dismissed. However, there will be no order as to costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Sub-Court, Nagapattinam
2. The District Munsif, Nagapattinam.
3. The Record Keeper,
V.R.Section, High Court, Madras.

1 cc To Mr.T.P.Sankaran, Advocate, SR.30597.

S.A.No.949 of 1994

TEJ(CO)
RVL 30.05.2007

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